HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.2215 OF 2005.

Swami Kumarayya Kurma. ...Applicant.

V/s.

The State of Maharashtra. ...Respondent

Shri A.G.Lalla i/b. Lalla & Lalla, for applicant.

Shri A.S.Gadkari, APP for respondent.

CORAM: A.M.KHANWILKAR,J
DATE : APRIL 28, 2005

P.C. :-

1. Heard the counsel for the parties. Perused the record.

2. I see no reason to depart from the conclusion reached by the court below in rejecting prayer for bail, made by the present applicant.

3. Mr. Lalla, counsel for the applicant however, contends that the court below has glossed over the relevant aspects of the matter namely that recovery of contraband from the applicant is only 3 kg. which is less than commercial quantity. The recovery of 65 kgs. of contraband found under a bed belonged to co-accused

who is absconding and there is no evidence on record that the said contraband item belonged to applicant exclusively or that the applicant can be said to be in conscious possession thereof. To support his submission, reliance is placed on the case of **Alakh Ram V/s State of U.P., reported in 2004 Cr.L.J.905.**

4. The argument seems to be attractive. But on closer scrutiny, I find substance in the submissions made by the learned APP that the prosecution case is that a specific information was received that the applicant and co-accused were jointly engaged in dealing with the contraband items. Pursuant to the said information, raid was conducted and contraband items were recovered from the premises where the applicant was arrested. Recovery panchanama clearly indicates that when the premises were raided, the applicant was found in the premises. He was possessing one bag containing contraband of 3 kgs., which is less than commercial quantity. The prosecution case is that the applicant was engaged in dealing with the contraband items from the disputed premises alongwith the co-accused. If that case is to be accepted as it is for the time being then, even recovery of 65 kgs. of the contraband from the same premises, the applicant would be accountable although applicant states that the

same belongs to the absconding co-accused. Besides, recovery of contraband from applicant, weighing machine, weights of different denominations were found kept in bag recovered from the same premises which supports the prosecution case that the contraband was sold from the said premises where the applicant was found.

5. To get over this position, counsel for the applicant, relying on the statement of Landlady Smt.Tayyabi Baba Shaikh, contends that it is obvious that premises were given on leave and licence to Balaji Reddy. On the basis of this evidence, it is contended that the premises belong to co-accused and for which reason, conscious possession of the contraband item cannot be attributed to the applicant. Indeed, the statement of landlady mentions that the premises were given to Balaji Reddy, the absconding co-accused; but nowhere it is mentioned that he was alone in exclusive possession and did not permit any other person in particular, the applicant to enter the premises. In other words, the prosecution case will have to be accepted as it is, for the time being for considering prayer for bail.

6. From the material on record, it is obvious that

the raid was conducted by the officer on specific information received that the applicant and co-accused were indulging in trade of contraband items from the said premises. That case will have to be accepted as it is, for the time being. Viewed in this perspective, there is no substance in the submission canvassed on behalf of the applicant. Reliance placed on the decision of the Apex Court is of no avail to the applicant in the fact situation of the present case. In that case, the findings reached by the court that the contraband item did not belong to applicant exclusively was reached only after the trial on the basis of evidence adduced by the parties. That stage is yet to arrive in the present case.

8. As I am prima facie of the opinion that Section 37 of the N.D.P.S. Act applies to the case on hand, having regard to the provisions of Section 37 of the NDPS Act, the court will have to record satisfaction that there is reason to believe that the applicant is not guilty of the alleged offence. Such a finding cannot be recorded on the basis of material on record. Hence dismissed.

9. As prayer for bail is rejected, trial Judge may

expedite the hearing of the trial as High court expedited case. In the event, the co-accused is not available for trial, it will be open to separate the case of the applicant and proceed with the trial against the applicant to ensure the early disposal of the trial.

10. Needless to observe that, the opinion expressed in this order is only tentative, to consider prayer for bail and the trial court shall not be influenced by any of the observations made in this order or order passed by the lower court in rejecting the prayer for bail.